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No. 03-101

In The Supreme Court of the United States

GALE NORTON, SECRETARY,
DEPT. OF INTERIOR, et al.,

Petitioners,

v.

SOUTHERN UTAH WILDERNESS ALLIANCE, et al.,

and

UTAH SHARED ACCESS ALLIANCE, et al.,

and

STATE OF UTAH, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR RESPONDENTS UTAH SHARED ACCESS ALLIANCE, ET AL.

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QUESTION PRESENTED

Whether a complainant can elect to bring an action against a federal agency under the Administrative Procedure Act, 5 U.S.C. § 706(1), to "compel agency action unlawfully withheld or unreasonably delayed" in situations where the agency has acted and continues to act on the legal duties in question.

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 24.2, Respondents Utah Shared Access Alliance, et al., adopt Petitioners' identification of the parties, and note, by way of clarification, that there are three separate groups of Respondents who have taken distinct and often conflicting positions on the issues in this case. The first group of Respondents here (collectively "SUWA") were Plaintiffs in the District Court and Appellants in the Tenth Circuit:

1. Southern Utah Wilderness Alliance;
2. The Wilderness Society;
3. Sierra Club;
4. Great Old Broads for Wilderness;
5. Wildlands CPR;
6. Utah Council of Trout Unlimited;
7. American Lands Alliance; and
8. Friends of the Abajos.

The second group of Respondents here (collectively "USA-All") were Defendant-Intervenors in the District Court, Appellees in the Tenth Circuit, and Petitioners before this Court in No. 02-1703:

1. Utah Shared Access Alliance;
2. BlueRibbon Coalition;
3. Elite Motorcycle Tours; and
4. Anthony Chatterly.

PARTIES TO THE PROCEEDINGS – Continued

Pursuant to Supreme Court Rule 29.6, Respondents Utah Shared Access Alliance, BlueRibbon Coalition and Elite Motorcycle Tours hereby disclose that they are nongovernmental corporations, but do not have any publicly issued shares and further disclose there is no parent or publicly held company owning 10% or more of the stock of any of these corporate Respondents.

The third group of Respondents here were Defendant-Intervenors in the District Court and Appellees in the Tenth Circuit:

1. State of Utah;
2. San Juan County, Utah;
3. Emery County, Utah;
4. Kane County, Utah;
5. Wayne County, Utah;
6. Utah School and Institutional Trust Lands Administration.

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STATEMENT OF THE CASE

This case involves an effort to compel proper action by the Bureau of Land Management ("BLM") regulating off-road vehicle access in Utah.[1] Respondents USA-All support the position of Petitioners, have reviewed Petitioners' Statement in their Petition for Writ of Certiorari, and are likely to join in Petitioners' Statement in their merits brief. Since counsel has been unable to review that Statement but must submit a brief supporting Petitioners' position contemporaneously with the filing of Petitioners' brief, this Statement will avoid a complete description of the facts and proceedings below. Instead, this Statement will more fully describe the nature and extent of the agency activity addressing off-highway vehicle access to public lands in Utah.

1. On October 27, 1999, Plaintiffs-Respondents Southern Utah Wilderness Alliance, et al. ("SUWA") filed a complaint in the United States District Court for the District of Utah against the Secretary of the Department of Interior, the Bureau of Land Management ("BLM") and the Director of BLM, alleging that BLM had "'failed to perform its statutory and regulatory duties' by not preventing harmful environmental effects associated with off-road vehicle use" on BLM-managed federal lands. Pet. Ap. at 3a.

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[1] The term "off road vehicle" ("ORV") is used in BLM regulations and typically refers to motorized vehicles ranging from full size pickups, sport utility vehicles and jeeps to all-terrain vehicles to motorcycles, all "capable of, or designed for, travel on or immediately over land . . . or other natural terrain. . . ." 43 C.F.R. § 8340.0-5.

The complaint advanced ten (10) separate claims for relief, all seeking judicial review solely under section 10(e)(A) of the Administrative Procedure Act (the "APA"), codified at 5 U.S.C. § 706(1) ("APA section 706(1)"). Pet. Ap. at 3a. According to SUWA's theory, BLM was failing to take action in complete conformance with the Federal Land Policy and Management Act ("FLPMA") to prevent ORV "impairment" of Wilderness Study Areas, was failing to take sufficient action to implement certain provisions of applicable land management plans, and was failing to supplement certain environmental analyses regarding ORV use. *Ibid.* SUWA acknowledged that BLM had taken actions to address ORV management in the areas at issue, but characterized these efforts as "half steps" upon the applicable legal duties. See Pet. Ap. at 66a. SUWA therefore sought to "compel" BLM management action they believed to be "unlawfully withheld or unreasonably delayed."

The district court heard, and dismissed for lack of subject matter jurisdiction, claims brought through a motion for preliminary injunction.[2] SUWA's preliminary injunction focused on BLM ORV management at nine (9) discrete areas in Utah. Four (4) of the areas are WSAs, known as the Parunuweap WSA, Moquith Mountain WSA, Behind the Rocks WSA, and Sids Mountain WSA. Pet. Ap. at 61a. At these areas SUWA argued BLM was failing to sufficiently act on FLPMA's "nonimpairment" mandate, and further argued the agency was "failing to consistently

[2] Respondents USA-All filed the only motion to dismiss SUWA's claims, which was generally supported but not joined by BLM below. See Pet. Ap. at 57a.

implement the terms of its land use management plans" and was failing to act in accordance with BLM's general ORV management regulations. *Ibid.*

The other areas at issue were "Section 202 areas," including "lands adjacent to the Parunuweap, Behind the Rocks, and Indian Creek WSAs, as well as areas around Factory Butte, North Caineville Reef, and Wildhorse Mesa." Pet. Ap. at 71a. At these areas SUWA argued BLM was failing to act in accordance with its land use plans, BLM's general vehicle planning regulations, and regulations addressing a duty to supplement existing National Environmental Policy Act analyses. *Id.* at 72a.

2. The agency here has acted and continues to act on its legal duties to monitor and regulate vehicle access on BLM-managed lands. These actions occur on various levels in the tiered administrative planning process.[3] In general terms, such actions can occur through broad-scale "program level" planning, as well as more narrow and focused sites/issues through separate "project level" planning. See generally *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 729-730 (1998) (discussing relationship between program level and project level planning for U.S. Forest Service). BLM follows an analogous process, since Congress, through FLPMA, has directed BLM to prepare "land use

[3] Neither the Tenth Circuit nor District Court decisions present a detailed description of BLM's management actions. The Tenth Circuit decision generally summarizes some of the actions, but does not address the legal basis for, and significance of, these final agency actions, but instead focuses on the implementation aspects of the various orders, such as signing and visitor education efforts. Pet. Ap. at 19a n.11.

plans" which BLM refers to as resource management plans ("RMPs"). 43 U.S.C. § 1712; 43 C.F.R. § 1601.0-5(k). An RMP is a written document outlining broad goals and directives, such as "allowable resource uses," "resource condition goals and objectives to be attained," "need for an area to be covered by more detailed and specific plans," and "intervals and standards for monitoring and evaluating the plan. . . . " *Ibid.* The public "shall be provided opportunities to meaningfully participate in and comment on . . . " RMP development, and RMPs are generated only after circulation of an environmental impact statement and other procedures as required by the National Environmental Policy Act. 43 C.F.R. § 1610.2.

BLM is also authorized and directed to more specifically address off-road vehicle planning, including project level planning. BLM "shall designate all public lands as either open, limited or closed to off-road vehicles." 43 C.F.R. § 8342.1. Such designations are to be based on specified criteria, including the minimization of impacts "to soil, watershed, vegetation, air, or other resources of the public lands, and to prevent impairment of wilderness suitability." *Id.* at (a). This designation occurs through the RMP planning process, but can be reconsidered or more specifically addressed through the ongoing process of revising or amending the applicable RMP. 43 C.F.R. § 8342.2(a); 43 C.F.R. § 1610.5-5 (amendment); 43 C.F.R. § 1610.5-6 (revision). Thus, BLM conducts an open and forward-looking planning process addressing vehicle access "in a manner that provides an opportunity for the public to express itself and have its views given consideration." 43 C.F.R. § 8342.2(a).

In specified circumstances, BLM may also take more immediate action to regulate vehicle access. Upon a

finding that "off-road vehicles are causing or will cause considerable adverse effects upon soil, vegetation, wildlife, wildlife habitat, cultural resources, historical resources, threatened or endangered species, wilderness suitability, other authorized uses, or other resources . . . " the applicable BLM official "shall immediately close the areas affected to the type(s) of vehicle causing the adverse effect until the adverse effects are eliminated and measures implemented to prevent recurrence." 43 C.F.R. § 8341.2(a). Such orders may be issued outside the public planning process, although the presence of such an "emergency" order does not prevent further analysis through further public planning. *Ibid.* BLM is also authorized to issue "closure and restriction orders" as necessary "[t]o protect persons, property, and public lands and resources. . . . " 43 C.F.R. § 8364.1(a). The applicable regulation states only that such orders be posted at specified places and published in the Federal Register, but does not clarify how such orders relate to the ongoing planning process or the "emergency" orders authorized under section 8341.2(a). 43 C.F.R. § 8364.1.

Aggrieved participants in any BLM planning process have the option of pursuing administrative review of the agency's decision. For RMPs, participants in the planning process can file a protest which will ultimately be decided by the Director of BLM. 43 C.F.R. § 1610.5-2. Other decisions, such as those adopting vehicle designation plans, are typically subject to protest and/or administrative appeal. 43 C.F.R. §§ 4.410-4.411 (describing decisions subject to appeal); 43 C.F.R. part 4, subpart B (prescribing general rules for BLM appeals). Those dissatisfied by the results of such administrative review may pursue judicial review under the APA. 5 U.S.C. §§ 702, 704.

BLM has previously issued RMPs or equivalent land use plans for all the areas at issue in this action, and is in the process of revising those plans. For instance, the agency published notice of intent to RMP revisions for the Moab and Monticello Field Offices, which manage a total of about 2.46 million acres of public lands, including many lands addressed by this action. 68 Fed.Reg. 33526 (June 4, 2003); http://www.moabrmp.com. Numerous public meetings and opportunities for input will occur during this process, which will consider BLM direction for virtually all management issues, including "access to and transportation on the public lands." 68 Fed.Reg. 33527 (June 4, 2003). The Price Field Office has issued a similar notice, indicating it is generating an RMP for the approximately 2.5 million acres of lands it manages. 66 Fed.Reg. 56343-56344 (November 7, 2001); http://www.pricermp.com. The same is true of the Richfield Field Office, whose RMP will address approximately 2.2 million acres of BLM-managed lands. 66 Fed.Reg. 55202 (November 1, 2001); http://www.richfieldrmp.com. Thus, interested members of the public, including all Respondents in this case, can actively participate in the ongoing planning process in the hopes of influencing BLM's programmatic management direction for the lands at issue here.

BLM has also issued numerous project level decisions affecting vehicle access to specific areas targeted in SUWA's preliminary injunction motion. Prior to the filing of this action, BLM issued vehicle and camping restrictions in the Indian Creek Canyon Corridor. In part, these restrictions limited all motor vehicle and mountain bike travel to "existing roads and trails." 63 Fed.Reg. 110 (January 2, 1998). During the early stages of the case, the Price Field Office issued a "temporary emergency closure"

addressing all seven (7) WSAs within its jurisdiction. 65 Fed.Reg. 15169-15170 (March 21, 2000). This order completely prohibited vehicle access within six of the seven areas, and limited vehicle travel in the remaining Sids Mountain WSA to four (4) designated routes. *Id.* at 15170. The Federal Register notice partially describes the basis for this order, stating "[t]he impairment of wilderness values necessitates this emergency closure order in the seven WSAs. . . . " *Ibid.*; see also Tr. at 134-165 (district court testimony of Price Field Office Manager describing decision and implementation efforts). To aid implementation and enforcement efforts, BLM, with the assistance of varied local interest groups, installed "about 266 signs, . . . 19 barricades comprised of 97 segments of buck and pole fence to the tune of about 2000 feet and 12 kiosks or information bulletin boards that have been placed . . . " in the Sids Mountain WSA. Tr. at 676.

The BLM Kanab Field Office conducted a public planning process over several years which ultimately led to adoption of a land use plan amendment covering the Moquith Mountain area, including the Coral Pink Sand Dunes. 65 Fed.Reg. 19921 (April 13, 2000). This decision, adopted following an environmental assessment and finding of no significant impact in accordance with the National Environmental Policy Act, addressed a variety of issues including sensitive species and vehicle management. *Ibid.*; see also Tr. at 387-403 (testimony of planning team leader describing planning process). As a result of this decision, "[o]ver 95 percent of the WSA is closed to [ORV] use." *Id.* at 407. The Kanab Field Office subsequently issued additional "temporary emergency [ORV] travel limitations" restricting travel within three (3) WSAs "to only those travel routes and ways identified during the

original wilderness inventory completed in 1980 and shown on the inventory maps. . . . " 65 Fed.Reg. 52437 (August 29, 2000).

The BLM Moab Field Office has completed similar management efforts. Through either the applicable RMP or through additional closure orders, travel within the Behind the Rocks WSA "is limited to the inventoried ways that were part of the WSA inventory." Tr. at 37. Like other offices, the Moab office conducts ongoing monitoring and on-the-ground implementation efforts. Tr. at 218-237. The Moab Office also issued an extensive "interim" restriction order revising previous "open" travel designations and requiring travel to be limited to existing roads and trails on approximately 245,642 acres, and implementing closures to vehicle access at other specified locations. 66 Fed.Reg. 6659-6661 (January 22, 2001).

In at least some instances, BLM has revisited the "temporary" restrictions outlined above and has addressed vehicle access issues through a more thorough public planning process. For example, the Price Field Office has completed the San Rafael Route Designation Plan, which analyzed vehicle access issues throughout the Price Field Office, including the seven WSAs covered by the March, 2000, closure order. BLM Decision Summary, http://www.ut.blm.gov/sanrafaelorv.wthedecision.htm. This decision authorizes continued ORV travel along 677 miles of "secondary [ORV] routes" while closing 468 miles of routes to vehicle access. *Ibid.* The Route Designation Plan reanalyzed and left in place the March, 2000, management scheme for the Price Field Office WSAs. *Ibid.*

As is the case with most agency decisions, BLM's have been anything but universally accepted. However, at least

in BLM's assessment, the management actions have prevented impairment and allowed the WSAs to retain whatever wilderness values they possessed upon designation. See, e.g., Tr. at 47-48 (estimating impacts to Behind the Rocks WSA "to equate to about a 2/100 of a percent of the overall area" and concluding this level of impact is "insignificant in terms of the ability to designate it as wilderness."). BLM has certainly taken action to manage vehicle access, and will continue to do so during and beyond this litigation.

SUMMARY OF ARGUMENT

The Tenth Circuit's holding would significantly expand APA section 706(1) jurisdiction. The Tenth Circuit majority's new jurisdictional analysis will have dramatic practical consequences for all involved in the use and management of the lands in question. The consequences of this new relationship between administrative agencies, courts and the public will potentially extend beyond the specific context of this case into any relationships defined by the APA. This Court should reject the Tenth Circuit majority's approach and confine APA section 706(1) review to the appropriate situations where the agency has genuinely failed to act on plainly-prescribed legal duties.

ARGUMENT

A. The Tenth Circuit Decision Improperly Expands APA Section 706(1) Review and Allows Complainants to Bypass Review of Final Agency Action.

The Tenth Circuit majority's decision would dramatically and unjustifiably expand APA section 706(1) review. Petitioners have properly noted many of the legal flaws in this approach. In particular, the Tenth Circuit majority's analysis of section 706(1) cannot be squared with this Court's guidance in *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871 (1990). *Lujan* does not specifically mention APA section 706(1), but counsels that judicial review under the APA proceeds according to a "case-by-case approach" which "is the traditional, and remains the normal, mode of operation of the courts." *Lujan*, 497 U.S. at 894.

1. The starting point in the jurisdictional analysis is whether the agency has taken "final agency action." *Lujan*, 497 U.S. at 882-883 (analyzing APA provisions at 5 U.S.C. §§ 702, 704 limiting judicial review to "final agency action" presented by a party "suffering legal wrong" or "adversely affected or aggrieved by agency action within the meaning of a relevant statute . . . "). "Final agency action" occurs when the action "mark[s] the 'consummation' of the agency's decisionmaking process" and when the action is "one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow'. . . . " *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997) (citations omitted). Where a claimant properly challenges final agency action, the reviewing court will analyze the claim under the "arbitrary and capricious" review standard. 5 U.S.C. § 706(2); *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). Under this

approach, the judiciary "intervene[s] in the administration of the laws only when, and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect." *Lujan*, 497 U.S. at 894.

The parallels between the *Lujan* analysis of the "final agency action" requirement and section 706(1) review have been noted by many courts, for *Lujan* is frequently discussed in cases considering the availability of section 706(1) review. See, e.g., *Sierra Club v. Peterson*, 228 F.3d 559, 566-567 (5th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001); *ONRC Action v. Bureau of Land Management*, 150 F.3d 1132, 1135-1136 (9th Cir. 1998); *American Farm Bureau v. U.S. EPA*, 121 F.Supp.2d 84, 102-103 (D.D.C. 2000). These decisions reject efforts like SUWA's as attempting the flawed strategy of "challeng[ing] an entire program by simply identifying specific allegedly-improper final agency actions within that program. . . . " *Peterson*, 228 F.3d at 567.

2. The Tenth Circuit majority's reasoning also fails to recognize the jurisdictional significance of BLM's actions on the relevant legal duties. The section 706(1) cause of action exists in large part to prevent an agency from avoiding review entirely by failing to do anything, for "[w]hen agency recalcitrance is in the face of clear statutory duty or is of such a magnitude that it amounts to an abdication of statutory responsibility, the court has the power to order the agency to carry out its substantive statutory mandates." *Public Citizen Health Research Group v. Comm'r, Food & Drug Admin.*, 740 F.2d 21, 32 (D.C. Cir. 1984). A proper section 706(1) claim must identify "a genuine failure to act" as opposed to "complaints about the sufficiency of an agency action 'dressed up as an agency's failure to act.'" *Ecology Center v. U.S.*

Forest Service, 192 F.3d 922, 926 (9th Cir. 1999) (quoting *Nevada v. Watkins*, 939 F.2d 710, 714 n.11 (9th Cir. 1991)); see also *Public Citizen v. Nuclear Regulatory Comm'n*, 845 F.2d 1105, 1108 (D.C. Cir. 1988) ("Almost any objection to an agency action can be dressed up as an agency's failure to act."). Similarly, in a characterization closely tracking the District Court's reasoning in this case, the *Peterson* en banc majority rejected the failure to act claim before it, observing "the Forest Service has been acting, but the environmental groups simply do not believe its actions have complied with the [National Forest Management Act]." *Peterson*, 228 F.3d at 568. Noting the "concern that finding no final agency action here 'would put all of the Forest Service's on-the-ground violations ... beyond review'" the Fifth Circuit majority noted that *Lujan* and other cases direct claimants to "challenge discrete site-specific sales allowed by the Forest Service." *Ibid.*

The Tenth Circuit majority failed to properly understand and apply these principles. The weakness of the Tenth Circuit majority's reasoning is epitomized by footnote twelve of its opinion. Footnote twelve presents a hypothetical in which Congress prohibited all logging in a national forest, but the agency took action to prohibit logging in only half the forest, while allowing logging in the other half. Pet. Ap. at 20a n.12. The majority reasons that this hypothetical demonstrates the illogic of allowing section 706(1) jurisdiction to turn on the mere existence of "partial" agency action, which in the hypothetical is compared to the agency's compliance with only "half" of the applicable legal direction. *Ibid.*

Footnote twelve is flawed on several levels and ignores basic tenets of APA jurisdiction. The choice of a logging-oriented hypothetical is ironic, for in that specific

context this Court has noted that actual on-the-ground activity cannot occur absent both program- and project-level agency decisions affirmatively authorizing the activity. *Ohio Forestry*, 523 U.S. at 729-730. *Ohio Forestry* summarized the second step as having five (5) distinct components, the last of which is the right to challenge the agency decision "in an administrative appeals process and in court." *Id.* at 730. Certainly the existence of the hypothetical legal directive to prohibit logging could be a central component of such an attack on either the program level or project level decision, for one might reasonably, if not persuasively, argue that an agency decision to proceed with activity prohibited by Congress would constitute "agency action ... not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations.... 5 U.S.C. § 706(2)(A) and (C). Thus, a proper party has ample opportunity to challenge the hypothetical agency decision at issue, but such challenge should, and must, proceed via APA section 706(2). The Tenth Circuit majority ignored the availability of section 706(2) review in erroneously concluding that 706(1) review should be available to plaintiffs creative enough to characterize agency action as mere "half steps" to some broad statutory goal.

SUWA counters these jurisdictional limits on section 706(1) with unfounded fears they will create a jurisdictional vacuum. Specifically, SUWA claims it cannot bring its "nonimpairment" claims in a challenge to BLM's alleged management "half steps" because SUWA's "case challenges BLM's failure to impose just such restrictions." Brief in Op. to Pet. at 17 n.9. This argument is incorrect. All vehicle access on BLM lands flows from some affirmative agency decision. Even at the broadest programmatic

level, BLM must designate areas as "either open, limited or closed to off-road vehicles." 43 C.F.R. § 8342.1. *Ohio Forestry* offers guidance here. In particular, a program level decision to allow, or prohibit, activity which allegedly has immediate concrete effect on a party can form the basis for administrative and judicial review. *Ohio Forestry*, 523 U.S. at 738-739 (discussing Solicitor General's concession at argument that land use plan decision to close an area to vehicle use, or to "allow[ ] motorcycles into a bird-watching area or something that like, that would be immediately justiciable"). In a decision like an RMP, BLM must consider and apply the nonimpairment mandate and numerous other applicable statutes, in determining whether to allow, prohibit, or limit vehicle access throughout the *entire* planning area. An aggrieved party advocating or opposing vehicle access could challenge the agency's decision on any acre of the planning area, but such review must proceed under APA section 706(2).

Interested parties have even clearer opportunities for review when the agency takes project level action. SUWA's ability to challenge BLM's "nonimpairment" decisions is aptly demonstrated by BLM's actions addressing WSAs in the Price Field Office. On March 21, 2001, BLM issued a "temporary emergency closure" affecting all seven (7) WSAs administered by that office. 65 Fed.Reg. 15169 (March 21, 2000). This action prohibited all vehicle access to six (6) of the seven areas, and limited vehicle travel in the remaining area to four (4) designated routes "on a conditional basis ... contingent upon the success of a

rehabilitation and monitoring plan.... " *Id.* at 15170.[4] Certainly SUWA could have challenged the decision to allow access to continue on the four routes, just as USA-All could have challenged the decision to eliminate access in the remainder of the WSAs. Such challenges would proceed under APA section 706(2) and would focus on the agency record and the manner in which the agency reached and articulated the basis for its decision. SUWA is well aware of this option, having previously prosecuted, and succeeded upon, an administrative appeal to a similar BLM decision affecting the Moquith Mountain WSA. *Southern Utah Wilderness Alliance*, 142 IBLA 164 (1998). That appeal contains legal claims virtually identical to those presented in this case, for in the Moquith Mountain appeal "[w]hile [SUWA] concedes that the BLM Management Schedule 'offers some small steps in the right direction,' ([appeal Statement of Reasons] at 6), it challenges those aspects of the Decision which permit *any* continued ORV use in the WSA, in the face of what it claims to be ongoing impairment to the wilderness values in the area." *Id.* at 169 (emphasis added). One dissatisfied with the outcome of the administrative review process could seek judicial review as outlined in the APA and *Lujan*. SUWA can, and has, challenged BLM's decision to allow vehicle

[4] This "temporary emergency closure" has been continued by further final agency action in the form of the Price Field Office's San Rafael Route Designation Plan, which, aside from the WSA restrictions, allows travel to continue on 677 miles of "secondary OHV routes" while closing 468 miles of other routes. BLM Decision Summary, http://www.ut.blm.gov/sanrafaelohv/wthedecision.htm. SUWA is well aware of this Decision, as well as its right to challenge the same via administrative appeal. Brief in Op. to Pet. at 19 and n.12.

access to continue, just as logging opponents could challenge the agency's decision to allow logging on the "other half" of the Tenth Circuit majority's hypothetical forest. There exists jurisdiction under APA section 706(2) for such claims to proceed.

Participants in the kaleidoscopic public lands debate have ample opportunity to challenge agency decisions affecting their varied interests. Until now, such challenges proceeded under APA section 706(2), in which a reviewing court focused on the administrative record before the agency and the agency's ability to articulate the basis for its decision, with due deference accorded administrative discretion and expertise. APA section 706(1) was generally understood to parallel mandamus review in the context of the APA, and was utilized in the rare instance when an agency utterly failed to take any action where it lacked discretion as to whether action was required or failed to act on a plainly prescribed legal duty. The Tenth Circuit majority's approach here would dramatically alter this view, and would allow creative plaintiffs to "dress up" a challenge to the sufficiency of any agency action as the agency's "failure to act." This result would allow litigants to effectively bypass the "arbitrary and capricious" review of APA section 706(2) in the hopes that a single district court judge might be more sympathetic to the claim that the agency had "unreasonably delayed" complete compliance with some statutory directive. This Court should reject this shift, and clarify that when an agency takes action to implement its statutory duties, as BLM did here, APA section 706(2) presents the sole method by which an aggrieved party can challenge the agency's decision.

B. The Tenth Circuit Approach Will Discourage and Nullify Participation in the Administrative Process.

The obvious consequence of the Tenth Circuit majority's new rule will be to encourage more frequent and even more creative use of APA section 706(1) by special interests seeking to influence the management balance sought by administrative agencies.

The modern administrative state depends on the premise that agencies will be delegated meaningful authority within the realm of their specialized expertise. In order to exercise that authority, agencies must promulgate and apply procedures and regulations designed to ensure appropriate involvement of the regulated parties in administrative decisionmaking. Courts evaluating actions under the APA regularly consider the nature of the administrative process. While such discussion often occurs when applying the doctrine of exhaustion of administrative remedies, it is relevant here in describing the proper role of the administrative process. Many of the related jurisdictional doctrines such as finality, ripeness, mootness and exhaustion reflect the need to respect the administrative process and to "postpone judicial intervention until the plaintiff's need for judicial help is clear and the record is adequate to enable the intelligent performance of the judicial function." *Glisson v. U.S. Forest Service*, 55 F.3d 1325, 1327 (7th Cir. 1995). Agencies should be provided some latitude to perform their delegated functions, "[a]nd since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise." *McKart v. United States*, 395 U.S. 185, 194 (1969). Particularly in such instances "[t]he

courts ordinarily should not interfere with an agency until it has completed its action, or else has clearly exceeded its jurisdiction." *Ibid.*

It is generally proper to confine judicial review to final agency decisions, for courts "must rely on the rationale adopted by the agency if we are to guarantee the integrity of the administrative process. Only in that way may we 'guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.'" *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807 (1973) (citations omitted, quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941)). Withholding premature review helps maintain the proper relationship between the courts and agencies, as "notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors." *McKart*, 395 U.S. at 195. Unjustified judicial review through "frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures." *Ibid.*

For agencies like BLM which regulate and regularly interact with the general public, it is critical to maintain an open and respectful dialogue regarding the agency's conduct and rationale for any restrictions on the public. Agency decisions must be carefully disclosed and discussed in a public planning process, because "it is also a familiar (and fundamental) tenet of administrative law that '[t]he failure to admit or explain . . . a basic change in the interpretation of a statutory standard to be applied to conduct of the public undermines the integrity of the administrative process.'" *Hall v. Baker*, 867 F.2d 693, 696

(D.C. Cir. 1989) (quoting *Hatch v. Federal Energy Regulatory Comm'n*, 654 F.2d 825, 835 (D.C. Cir. 1981)) (bracketing and elipses in *Hall*).

The Tenth Circuit majority's jurisdictional rule reflects or promotes these evils. As a section 706(1) claim ostensibly challenges the agency's failure to act, some courts have held "review is not limited to the record as it existed at any single point in time, because there is no final agency action to demarcate the limits of the record." *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000). This situation effectively diminishes the level of deference accorded agency determinations, while allowing plaintiffs to freely submit evidence that might be excluded in section 706(2) review confined to the record before the agency at the time of the decision. See *Camp v. Pitts*, 411 U.S. 138, 142-143 (1973). The difficulty and inefficiency of this approach is reflected here, where the District Court spent a total of six days in evidentiary hearings creating "the record" on SUWA's preliminary injunction motion. See Pet. Ap. at 65a (explaining District Court received testimony "during a two-day hearing on Plaintiffs' motion for temporary restraining order and during a four-day preliminary injunction hearing. . . . "). Such an approach requires investment of substantial resources by the court and the participants, and presents the risk of awkward overlap between judicial and administrative functions in compiling and reviewing plaintiffs' formulation of a "record" of the selected inaction for the first time in the district court.

Of even greater concern is the potential that such procedures invite judicial intrusion into ongoing administrative processes. Supposedly a section 706(1) claim could

do no more than "compel" the agency to exercise its discretion on the ignored legal duty, but here SUWA invites the court to close areas to vehicle access in response to BLM's alleged "failure to act" on the nonimpairment mandate. This situation presents a clear risk that a single district court judge might "slid[e] unconsciously from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

Finally, from the perspective of regulated parties and the public, the Tenth Circuit majority's rule leaves little incentive to participate fully, if at all, in the administrative process. Instead, interested parties might continually threaten and bring section 706(1) claims in the hope of gaining leverage or badgering the agency into management changes outside the administrative process. Those diligently attending public meetings and submitting comments to the agency's proposed decisions will likely see their input overshadowed by closed door negotiations between the agency and special interests brandishing broad section 706(1) claims. Under the new rule, the administrative process will at best be a symbolic exercise where interested parties participate to the minimum extent necessary to satisfy any jurisdictional prerequisites to further review, while focusing their efforts on the dialogue occurring outside the formal public process. Such a result warps fundamental principles of administrative law.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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